

EX PARTE OR LATE FILED  
COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE, N.W.

P. O. BOX 7566

WASHINGTON, D.C. 20044-7566

(202) 662-6000

TELEFAX: (202) 662-6291

TELEX: 89-593 (COVLING WSH)

CABLE: COVLING

WRITER'S DIRECT DIAL NUMBER

LECONFIELD HOUSE  
CURZON STREET  
LONDON W1Y 8AS  
ENGLAND  
TELEPHONE 071-495-5655  
TELEFAX 071-495-3101

BRUSSELS CORRESPONDENT OFFICE  
44 AVENUE DES ARTS  
BRUSSELS 1040 BELGIUM  
TELEPHONE: 32-2-512-9890  
TELEFAX: 32-2-502-1598

October 24, 1994

BY MESSENGER

Mr. Andrew S. Fishel, Managing Director  
William E. Kennard, Esq., General Counsel  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, DC 20554

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Re: Preliminary Reply of APC to Pacific Telesis  
Opposition to Notice of Ex Parte Violation  
and Request for Investigation  
Gen. Docket 90-314

Dear Messrs. Fishel and Kennard:

Although Pacific Telesis has not yet served us with an opposition to our October 17 letter notifying the Commission, on behalf of American PCS, L.P. d/b/a American Personal Communications ("APC"), of Pacific Telesis' violation of the Commission's ex parte rules, we have read press reports describing such a pleading.<sup>1/</sup> We thus are forced to file this preliminary response based on these reports, and we will supplement this response if necessary when Pacific Telesis does serve its opposition.

I.

As we understand it, Pacific Telesis does not deny the fact that its chief executive officer, Phillip Quigley, made the following statements to an audience including the Chairman, Commissioners and FCC staff:

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<sup>1/</sup> See The Washington Post, Oct. 22, 1994, at D1; Communications Daily, Oct. 24, 1994, at 2. The tactic of providing an FCC pleading to news outlets immediately but serving that pleading by mail on opposing counsel appears to be standard practice at Pacific Telesis. APC has observed the professional courtesy of serving time-sensitive pleadings by hand the day they are filed, knowing that it would otherwise take several days for mail delivery.

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- That Omnipoint Communications, Inc. was "the only legitimate pioneer" among the three pioneers, a class that includes APC.
- That "there's no way [the pioneers'] technical contributions merit a billion-dollar discount."
- That APC's preference was "unearned."

Perhaps Pacific Telesis needs a checklist, like the following, to understand when the ex parte rules apply to its presentations to the Commission.

- |   | <u>Yes</u> | <u>No</u> |
|---|------------|-----------|
| 1. Is it a restricted proceeding?   |            |           |
| 2. Is it an <u>ex parte</u> presentation to Commissioners or other decision-making personnel? |            |           |
| 3. Do any of the exceptions apply?  |            |           |

Here, the answers are straightforward:

1. Yes. The issue of APC's pioneer preference is the subject of a restricted proceeding at the Commission. Petitions for reconsideration are pending, and the Commission has committed to the Court of Appeals that it will act imminently to resolve those petitions.<sup>2/</sup> Statements that a

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<sup>2/</sup> As the General Counsel stated to the Court in late September (in a case in which Pacific Telesis is actively participating):

[T]he Commission's staff has prepared a draft of a decision acting on the reconsideration petitions. The current draft now is in the editing and review process before being presented to the Commissioners for their consideration. The staff intends and expects to complete its revisions and to present a draft order to the Commissioners early in October.

Further Response of FCC, at the Court's Discretion, to Motion to Compel Agency Action, APC v. FCC, No. 94-1549, at 2 (D.C. Cir. filed Sept. 27, 1994); see also Response of FCC to Motion

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party to a restricted proceeding is not a "legitimate" prevailing party, that its efforts do not "merit" its award, and that the results of the proceeding were "unearned" quite clearly address the merits of a restricted proceeding.

2. Yes. Pacific Telesis apparently does not deny that the Commissioners, including the two who have recused themselves, and the Commission's staff were recipients of its impermissible ex parte presentation.

3. No. Pacific Telesis' public rhetoric has emphasized that Mr. Quigley's speech was not clandestine or surreptitious.<sup>3/</sup> There is, however, no provision in the Rules or case law precedent establishing that only conversations in broom closets or other stealth locations qualify as ex parte contacts. The most elementary understanding of the ex parte rules, of which Pacific Telesis is evidently bereft, shows why there is not and should not be an exception for public statements. Just as in the case of private conversations in which Pacific Telesis also may have tried to engage at the same convention, statements in speeches are not subject to the agency's procedural safeguards, and there is no opportunity for reply by the speaker's opponents.<sup>4/</sup>

Pacific Telesis' tactic is improper and illegal. If an exception to permit such attacks were to be read into the rules, one party to an adjudication could present its view of the merits of a pending hearing to a convention attended by the FCC administrative law judge hearing the case, the Review Board, and the full Commission. Such a holding would invite widespread abuses of the Commission's ex parte rules and would

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to Compel Agency Action, APC v. FCC, No. 94-1549, at 8 (D.C. Cir. filed Sept. 12, 1994) (anticipating that "a decision will follow shortly thereafter").

<sup>3/</sup> Nor, of course, did APC claim that the presentation was "clandestine" or "surreptitious." The words that came to our mind were "flagrant" and "blatant."

<sup>4/</sup> The statements in Mr. Quigley's speech contained factual and other errors, which our October 17, 1994 letter did not address. We note that even if APC officials had been present at the convention, they would not have had a fair opportunity to defend APC against Mr. Quigley's broadside.

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force the Commission to confront the issue of whether it is proper at all for Commissioners and staff to attend industry functions where they could be an unwilling captive audience for such improper and illegal ex parte attacks.

II.

Thus, it is plain that grant of APC's pioneer preference is a restricted proceeding; even Pacific Telesis does not deny that the Commissioners were in attendance; and Pacific Telesis does not claim that any of the legitimate exceptions specified in the Commission's Rules applied to Mr. Quigley's speech. It follows irresistibly, therefore, that Pacific Telesis violated the ex parte rules.

Pacific Telesis tries to evade the force of this logic by arguing that Mr. Quigley's speech concerned pending legislation. Much of it was about pending legislation, but that is irrelevant. The dispositive issue is whether any of his speech addressed APC's pioneer preference, and Mr. Quigley openly said in that speech that APC did not deserve its pioneer preference. He may have said more on that subject. Pacific Telesis' officials at the dinner may also have said more, or tried to say more, about the merits of APC's pioneer preference. But what is known from the press reports about Mr. Quigley's statements concerning APC's pioneer preference is without doubt enough to trigger the ex parte rules.

Pacific Telesis' argument is akin to a claim that because Mr. Quigley obeyed the speed limits during most of his trip, he did not violate them for the 10-mile stretch when he drove at 90 miles per hour. No state trooper or magistrate would buy that argument, and neither should the Commission.

The press reports of Pacific Telesis' opposition cite its point that APC did not ask for the speech to be investigated, only that other informal ex parte contacts in connection with the speech be investigated. There is nothing odd about that request. The speech was an ex parte violation on its face; no investigation is needed. But an investigation of supplemental ex parte violations by Pacific Telesis is appropriate, since if it thought, or assumed, it was permissible to discuss the merits of the preferences in a speech, it may have made the same assumption about informal contacts. In addition, other Pacific Telesis employees may

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have taken their cue from Pacific Telesis' highest manager and violated the ex parte rules as well.

In short, adjudicatory proceedings are to be conducted according to the rules of the game. Pacific Telesis has not lived by those rules. Its denial of the ex parte violation is either disingenuous or ignorant. In either event, the Commission should investigate and impose appropriate sanctions.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Jonathan D. Blake', with a long horizontal line extending to the right.

Jonathan D. Blake  
Kurt A. Wimmer

Attorneys for American  
Personal Communications

cc: Gen. Docket 90-314  
Michael K. Kellogg, Esq. (by hand)  
Courtesy copies: Parties of record  
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